UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVID FLAHERTY,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 98-254-P-H
	)	
S.D. WARREN COMPANY,	)	
	)	
Defendant &	)	
Third Party Plaintiff	)	
	)	
v.	)	
	)	
UNITED PAPERWORKERS	)	
INTERNATIONAL UNION, et al.,	)	
	)	
Third-Party Defendants	)	

Recommended Decision on Defendant's and Third-Party Defendants' Motions for Summary Judgement

Before the Court is Plaintiff's, David Flaherty, complaint alleging that Defendant, S.D. Warren, violated his rights under the American with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, and the Maine Human Rights Act, Me. Rev. Stat. Ann tit. 5, §§ 4551-4633[1]. Also before the Court is Defendant's third-party complaint against third-party defendants, Cumberland Mills Local 1069

[1] The two statutes are analyzed in the same manner. *Soileau v. Guilford of Maine*, 105 F.3d 12, 14 (1st Cir. 1997). Accordingly, the Court will refer only to the ADA in the remaining discussion.

("Local 1069") and United Paperworkers International Union ("UPIU").

Defendant has filed a motion for summary judgment on all claims asserted by Plaintiff. Third-party defendants Local 1069 and UPIU (referred to as, the "Union"), have likewise filed a motion for summary judgment on all claims asserted in the third-party complaint. For reasons stated below, the Court recommends that Defendant's motion for summary judgment be GRANTED and that the Union's motion for summary judgment be GRANTED.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting *National Amusements*

v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995)).

II. Factual Background[2]

A. Collective Bargaining Agreement

As stated above, the Court recites the following facts in Plaintiff's favor. Since 1968 a collective bargaining agreement ("CBA") has existed between Defendant and the Union. The present CBA embodying the seniority system at issue was signed in 1997 through 2002.

Positions at Defendant's facility are organized into a series of departments. Def. SOMF ¶16. Within each department an employee proceeds up, or regresses down from, a "line of progression." Each box in a line of progression may envelop more than one position. When one gets promoted or advances up the line of progression, one moves up to the next box.

---

[2] Plaintiff objects to the supplemental statement of material facts filed by S.D. Warren and by the Union because Local Rule 56 does not expressly permit it. The Court disagrees. Local Rule 56(d) expressly provides:

> A party replying to the opposition to a motion for summary judgment shall submit with its reply a separate, short, and concise statement of material facts which shall be limited to any additional facts submitted by the opposing party. The reply statement shall admit, deny or qualify such additional facts by reference to the numbered paragraphs of the opposing party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by subsection (e) of this rule.

Even though entitled as supplemental statement of material facts it is actually a reply statement of material facts as provided under Local Rule 56(d) and therefore, complies with the rule.

In addition, an imaginary horizontal line separates the "spares" from all other positions. A "spare" is where all employees enter the line of progression. A spare may be called on to do a variety of jobs and, because they are not bargaining unit employees, are more prone to layoffs. Hence, spares are referred to as "below the line" and all other positions are referred to as "above the line."

The entry-level box is the first box in the line of progression. Under the terms of the CBA, every employee must be able to perform a position in a given box before promoting up the progression line. Hence, two levels of seniority exist: millwide seniority, or time served at the facility, and line-of-progression seniority. Line-of-progression seniority requires every employee to progress up the line and be able to do at least one job before moving up to the next box.

In the 1980s the Union and Defendant agreed to a Memorandum of Understanding ("MOA") referred to as Millwide 21 in an attempt to address the employment status of union employees with medical restrictions. Millwide 21 permitted an employee to request reassignment within each box that was compatible with the employee's restriction. If no position was compatible with the employee's restriction, the employee regressed into the next lower box in the line of progression. Def. SOMF ¶ 24. If the employee could not perform any job in that box, the employee regressed to the spare position.

Because a spare is required to perform a majority of jobs in the line of progression, a task most disabled workers could not do, injured workers were often laid off. The Union expressed its concerns to Defendant that Millwide 21 failed to properly protect disabled workers.

In January 1994 the Union and Defendant signed a MOA also known as Millwide 28 to supplant Millwide 21. Under Millwide 28, the company physician, Union, and employee identify which position or positions the employee is able to perform. Def. SOMF ¶ 30. If no position is available in the restricted employee's box the employee regresses to the next box. If the employee cannot perform any job in the next box he is then "ghosted above the line" rather than placed in a spare position as before. This allows the employee to be considered at the same level as employees in the entry-level box. Def. SOMF ¶ 30.

Under Millwide 28, the restricted employee can ghost above the line for three years. This time may be extended if the employee works in any long-term or short-term assignments beyond 56 days. During the time the employee "ghosts above the line" the employee retains seniority, employment status, and benefits. However, a restricted employee may not use his or her millwide seniority to skip over the entry level box, even if an opening exists in the next box that is compatible with the employee's restrictions. To permit such a practice would

violate the line-of-progression seniority established in the CBA. Third Party's SOMF ¶ 9.

Plaintiff began working for Defendant in September 1982. During the entire time he has been employed in the Finishing and Shipping Department at Defendant's paper and mill facility in Westbrook, Maine. Def. SOMF ¶52.

In June 1985 Plaintiff was diagnosed with tensosynotvtis of both upper extremities. Plaintiff sustained this injury during and arising out of his employment at Defendant's facility. At that time Plaintiff was able to transfer to a permanent bargaining unit position that met his medical restrictions. However, in June 1994 Defendant eliminated many positions, including Plaintiff's position, at the facility. Because no other available position met his medical restrictions Plaintiff regressed and was "ghosted above the line," as required under Millwide 28. Defendant's SOMF ¶53.

In accordance with Millwide 28, three positions were identified in the entry-level box which Plaintiff could perform with his restrictions: tour expediter, roll expediter, and skid warehouser. Def. SOMF ¶ 54. While being ghosted above the line Plaintiff has worked in all three positions during short-term and long-term vacancies. However, in 1998 Defendant eliminated the skid warehouser and tour expediter positions, leaving only the roll expediter position as a possibility for

Plaintiff.

It is the practice of Defendant to give restricted employees who ghost above the line light duty assignments while they wait for a bargaining level unit position to open. During the time Plaintiff has been "ghosted above the line" he has been given many light duties and other tasks to perform including, but not limited to, painting, cleaning, and updating various training manuals. Although Defendant assigns light duty tasks, it is not required to do so under the CBA or any other agreement with the Union. Def. SOMF ¶ 60.

Near the end of an employee's three-year period of "ghosting above the line" the company examines whether there is "light at the end of his or her tunnel." Def. SOMF ¶ 61. This term refers to whether or not the possibility exists that the employee will be able to find a bargaining unit position before the employee's clock expires. If this possibility does not exist, Defendant begins focusing its efforts from finding light-duty assignments to outplacement. The parties agree that under Millwide 28 Plaintiff's clock is due to expire on November 2, 1999.

B. Hostile Work Environment

Plaintiff alleges a series of incidents during the time he has been ghosted above the line to support his hostile work environment claim:

1. In late December 1995, Plaintiff's Department head, David Rowe,

confronted Plaintiff about turning his time cards into the Shipping Department while Plaintiff was working on light duty assignments. Mr. Rowe indicated that he didn't think this should be done and he would "see about that." Approximately ten days later, Plaintiff was taken out of work and relieved of his light duty assignments on or about January 4, 1996.

2. On the way to the meeting on January 4, 1996, other employees laughed, waved goodbye, and stated to Plaintiff that they would see him later. It was obvious from these actions that co-workers knew before Plaintiff did that he was being placed out of work.

3. At the meeting of January 4, 1996 at which Plaintiff was placed out of work, the Company representative, Roger Barr, was surprised the Plaintiff was working as much as he was in regular bargaining unit positions.

4. Roger Barr admitted at the January 4, 1996 meeting that he had been misinformed and was not aware of the extensive periods Plaintiff had been working in regular bargaining unit positions.

5. The only time light duty assignments should be terminated is if a disabled employee has no prospect of ever being able to perform any bargaining unit work. That was the assessment made regarding Plaintiff in January 1996 based upon misinformation supplied to Mr. Barr by David Rowe.

6. On his first day back in the department in July 1996, Plaintiff observed that on the workers' compensation poster it had been freshly written "guess who?." Plaintiff understood this was a reference to him as a disabled and injured worker.

7. Plaintiff was subjected to a safety shoe inspection prompted by complaints of a co-worker to a foreman, Peter DiSarno. In more than ten years in the Mill, Plaintiff had never observed any previous inspection but one time before.

8. On September 17, 1996, Plaintiff was alerted by one of the department foremen, Peter DiSarno, that he should check with Mike Bryant because

something funny was up about Plaintiff being removed from the schedule mid-week before he reached 55 days, filling in on a long-term vacancy which would stop the running of his three year termination clock under Millwide 28. When confronted by Plaintiff with this, David Rowe denied any knowledge. It was later determined the David Rowe was behind the attempt to remove Plaintiff from the schedule before he hit 55 days.

9. It was confirmed by the union steward involved in this issue that David Rowe was the only one who could change the schedule and would have been the only one to initiate the attempt to change Plaintiff's schedule mid-week.

. . . .

10. The scheduler for Plaintiff's Department, Mike Bryant, a management employee, confirmed that while others were excused for workers' compensation hearings, Plaintiff was not.

11. Mr. Bryant testified that the worst schedule in the department was consistently received by Plaintiff.

12. While Plaintiff was at a workers' compensation hearing on October 17, 1997, after the schedule had already been posted, Louise Paulin, the new department manager, changed it to give Plaintiff the least desirable shift.

13. The computerized scheduling system automatically schedules employees based upon seniority and qualifications for each job which has to be filled. This is the case except for those employees who have medical restrictions. For these employees such as Plaintiff, even though qualified for a job, they must be entered manually on schedule. This is so even though the computer system would automatically schedule a spare who is qualified for precisely the same positions as was Plaintiff. The spare would be scheduled by the system. Plaintiff would have to be scheduled manually.

14. It is common knowledge that the schedule could not be changed mid-week yet Peter DiSarno asked Mike Bryant about doing this to remove Plaintiff from the schedule.

. . .

15. Plaintiff is the only employee for whom the Company is tracking the three year clock under Millwide 28 and its successor.

16. There are a number of employees who appear, an official Company documents as holding a job but who probably should be ghosted. These include John Brooks, Russ Lappin, Ron Waters, Dan Wight, and Harold Tucker.

Discussion

A. Plaintiff's ADA Claim is not Barred by Statute of Limitations

Defendant, S.D. Warren, argues that Plaintiff's ADA claim is barred by the statute of limitations because he failed to file his claim within ninety days from receipt of his Notice of Right to Sue ("the Notice") from the EEOC. The Court disagrees.

Plaintiff filed a complaint with the EEOC in 1997 claiming, as here, that Defendant violated his rights under the ADA. On April 13, 1998 Plaintiff's counsel received the Notice from the EEOC dated January 14, 1998. Plaintiff, himself, never received the Notice and Defendant has no record of when he received the notice. Plaintiff's counsel notified the EEOC that he had not received the Notice until April and asked them to issue another one with an April date. The EEOC, in a letter dated June 10, 1998, refused stating:

> Your client's assertion that he had never seen the Notice of Right to Sue issued to him on January 14, 1998, prior to April 13, 1998, not withstanding, I decline your request to either issue a new one or to reissue

> the original one with a new date. There is no compelling reason to believe that he did not receive the Notice of Right to Sue in January 1998 as the employer did.[3] We have searched our returned mail and there is no evidence of the Notice having been returned by the Postal Service.
>
> Your client's Right to Sue in this matter has expired and cannot be restored by EEOC.

In disputing the position by Defendant and the EEOC Plaintiff points to "memos on calls" he made to the EEOC from late 1997 through April 1998. These calls reflect that Plaintiff's counsel called Ann Giantonio, the contact person at the EEOC regarding this matter. On January 24, 1998, a week after the Notice was apparently mailed, Plaintiff's counsel wrote:

> She [Ann Giantonio] believes all the reviews have been done and are in the process of being typed up. They [the EEOC] are in the process of moving and have been since November, so they are working out of boxes. She said that they are moving on 2/6, and we should hopefully have something by the middle of February.

Another memo to file dated March 2, 1998 reads:

> Unfortunately, their move took a lot longer than expected and therefore they have not gotten to any typing. It will be another two or three weeks before anything is done. We should follow-up at the end of the month.

The last memo to file dated April 9, 1998, reads simply:

> She [Ann Giantonio] will make sure the report goes out tomorrow.

---

[3] The employer, Defendant in this matter, in fact does not know when it received the notice.

Plaintiff's counsel's office stamped the Notice as received on April 13, 1998.

As Defendant properly points out, when an ambiguity exists as to when a party received the right to sue letter, "courts have applied a presumption of receipt within a certain number of days *after mailing*, including 3, 5, or 7 days." *Ellison v. Northwest Airlines, Inc.* 938 F. Supp. 1503 (D. Haw. 1996). However, unlike *Ellison*, where the EEOC sent the letter by certified mail thereby having a record of when the letter was sent, we do not know when the EEOC mailed the January 14, 1998 Notice.

The other two parties who may have knowledge of when the EEOC sent the Notice, the Defendant and the EEOC, are unhelpful. The Defendant does not know when it received the Notice. The EEOC's statement to Plaintiff's counsel that because "there is no evidence of the Notice having been returned by the Postal Service" it is presumed Plaintiff must have received it does not address whether the EEOC sent the Notice in January in the first place. In fact, the person repeatedly contacted by Plaintiff at the EEOC left the clear impression that the EEOC did not send the Notice until April 10, 1998.

The evidence on record convincingly points to the EEOC sending the Notice on April 10, 1998 and Plaintiff's counsel first receiving it on April 13th. Since the complaint was filed within ninety days after Plaintiff's counsel received

the Notice on April 13th, I recommend that the Court find that Plaintiff's ADA claim is not barred by the statute of limitations.

B. Findings at Worker' Compensation Hearing do not collaterally estop Plaintiff from Disputing Same Facts Here

Defendant next argues that Plaintiff is barred from raising facts that support his intentional discrimination or hostile environment claim because he raised those same facts before the Maine Worker's Compensation Board ("the Board") which found against Plaintiff. Even assuming that he did raise the same facts before the Board as he does here, the Court is satisfied that collateral estoppel does not apply to Plaintiff's ADA claim.

As Defendant points out, in *University of Tennessee v. Elliot*, 478 U.S. 788 (1986), the Supreme Court held that federal courts must give a state agency's factfinding the same preclusive effect it would be entitled to in state courts when the state agency acts in a judicial capacity and resolves, "'disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate'" *Id.* at 799; (citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, at 422 (1966)).

However, Defendant ignores the fact that in *Elliot* the Supreme Court held that Congress intended that a plaintiff bringing a Title VII claim is entitled to a

trial de novo on factual issues decided by the state agency. *Elliot*, 478 U.S. at 795. The Supreme Court earlier held that Congress intended the same result for claims brought under the ADEA. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 451, 470 (1982). The First Circuit explicitly extended this holding to claims brought under the ADA:

> The Supreme Court has explicitly held that Congress intended to displace federal common-law rules of preclusion in actions brought pursuant to Title VII and the ADEA, and, thus, judicially unreviewed state agency determinations are not entitled to preclusive effect in actions brought pursuant to those statutes. (citations omitted). Granted, the plaintiff has brought her claim under the ADA, but this distinction is of little moment: the ADA incorporates the same Title VII deferral procedures . . . on which the Supreme Court relied in *Kremer* and *Elliot*; therefore those holdings apply with equal force in the ADA context.

Thomas v. Contoocook Valley Sch. Dist., 150 F.3d 31, 40 n.5 (1st Cir. 1998). Here, the Board's findings were not judicially reviewed by the state court. Accordingly, for the reasons set forth in *Thomas*, Plaintiff is not collaterally estopped from raising the same facts he raised at the Board to support his claim here.

III. Plaintiff's request for accommodation is not reasonable because it would violate the seniority provisions in the CBA

Defendant and Third-Party Defendants both move for summary judgment on the ground that Plaintiff's request for accommodation is not reasonable because it

would violate the seniority provisions of the CBA. For the reasons explained below, the Court agrees.

Plaintiff's only request for reasonable accommodation is that Defendant permit Plaintiff to "ghost up the line". That is, that Defendant, in spite of the terms of CBA and Millwide 28, allow Plaintiff to skip a line of progression, i.e. the entry-level box, if a position is available in the next box that meets his needs. Plaintiff maintains that by failing to allow him to "ghost up the line" the CBA and Millwide 28 violate the ADA because it does not allow Plaintiff to use his millwide seniority. In effect, Plaintiff is asking this Court to re-write the CBA and Millwide 28 by finding that "line of progression" rights is a *per se* violation of the ADA. This the Court refuses to do.

Plaintiff's argument is not a novel one. Many circuits have addressed whether the ADA requires infringement of seniority rights as spelled out in the CBA. Almost all the circuits, including the First Circuit, have held that infringing upon the seniority rights of other employees is not a reasonable accommodation. In *Laurin v. Providence Hospital*, 150 F.3d 52, 60 (1st Cir. 1998) the plaintiff asked that Defendant waive the shift-rotation requirement provided under the CBA to accommodate her disability. The Court refused stating that the ADA does not require the employer to meet that request because it would violate the CBA.

Id.

Plaintiff points out that his request to "ghost up the line" is not a significant alteration. However any alteration of employees' seniority rights under the CBA is unreasonable:

> Requiring an employer to violate the collective bargaining agreement in situations where the employer regards the infringement on seniority rights as insubstantial and the accommodation reasonable unfairly would expose the employer to potential union grievances as neither the union nor the arbitrator hearing a grievance would be required to disregard violations of the collective bargaining agreement. Thus, a rule requiring an employer to violate seniority rights would subject the employer to the cost of defending itself against grievances as well as to the risk that it might be subject to a costly remedy. Accordingly, even minor infringements on other employees' seniority rights impose unreasonable burdens on employers who, by reason of those infringements, must face the consequences of violating the collective bargaining agreement.

Kralik v. Durbin, 130 F.3d 76, 83 (3rd Cir. 1997).

Largely because of the reasons stated above other circuits have likewise held that the ADA does not require the employer to infringe on the seniority rights of others. *See Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997) ("Following the other circuits which have considered this issue, we hold that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1045 (7th Cir. 1996) ("[W]e

conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees."); *Benson v. Northwest Airlines*, 62 F.3d 1108, 1114 (8th Cir. 1995) ("The ADA does not require that Northwest take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); *Wills v. Pacific Maritime Assoc.*, 162 F.3d 561 (9th Cir. 1998) ("A plain reading of the ADA supports the conclusion that an accommodation that would compel an employer to violate a CBA is unreasonable.").[4]

This Court is satisfied that as a matter of law, Defendant did not violate Plaintiff's rights under the ADA by refusing to provide an accommodation to Plaintiff that would have violated the seniority provisions in the CBA.[5] Further, having found for Defendant on this issue, third-party defendants are likewise entitled to summary judgment.

---

[4] Only in one case has a court of appeals balanced the proposed accommodation against the significance of the infringement on the employees' seniority rights to determine whether the ADA trumps the provisions of the CBA. *Aka v. Washington Hosp. Center*, 116 F.3d 876, 890-97 (D.C. Cir. 1997), *reh'g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997). However, *Aka* was later vacated and the subsequent decision did not address the significance of the CBA's terms on the plaintiff's ADA claim.

[5] Provisions of the CBA may violate the ADA if they are not bona fide, that is, if the provisions were written with the intent to discriminate. *Eckles*, 94 F.3d at 1046-1047. Plaintiff has failed to point to any facts that contradict Defendant's factual averments that the CBA contains a bona fide seniority system.

IV. Plaintiff's "Disparate Impact" Claim

Plaintiff also appears to allege that Defendant's "policies" treat him differently because he is disabled. However, the only "policy" Plaintiff points to is the CBA. As stated above, the Court has found that neither Defendant nor the third-party plaintiffs are obligated to modify the bona fide provisions of the CBA. Therefore, I recommend that the Court grant Defendant's motion for summary judgment on this claim.

V. Intentional Discrimination

Plaintiff next alleges a series of facts to support his claim that Defendant intentionally discriminated against him. To establish a claim of intentional discrimination the Court looks to the burden shifting analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglass* Plaintiff must make out a prima facie case of discrimination. To establish a prima facie case under the ADA Plaintiff must prove: (1) that he was disabled within the meaning of the ADA; (2) that, with or without reasonable accommodation, he was able to perform the essential functions of his job (in other words, that he was "qualified"); and (3) that he suffered adverse employment action under circumstances giving rise to an inference of discrimination. *EEOC v. Amego, Inc.* 110 F.3d 135, 141 (1st Cir. 1998).

The Court is satisfied that Plaintiff has failed to allege facts to support his claim of discrimination. The parties appear to agree that, because of Plaintiff's disability, he can perform only one position in the entry-level box, roll expediter. However, Plaintiff has not alleged any facts to suggest Defendant awarded the position to someone who had less seniority than Plaintiff under the CBA, or even that the position ever became vacant during the time he has been ghosted above the line. Therefore, Plaintiff can only be claiming that he be awarded the roll expediter position or that he be permitted to ghost up the line in spite of the terms in the CBA. As stated earlier, changing the terms of the CBA is not a reasonable accommodation. Without placing in dispute the basic fact that, under the terms of the CBA, Plaintiff should have been offered the position but was not, Plaintiff's discrimination claim must fail.[6]

VI. Hostile Work Environment

Plaintiff next alleges that during the time he spent "ghosting above the line" he was subjected to a hostile work environment. While the ADA does not explicitly permit a claim based on a hostile work environment most courts have

[6] With regard to the other positions in the entry-level box, Plaintiff has not alleged any facts to suggest what accommodations Defendant could provide to assist him so that he could qualify for them. *See Feliciano v. Rhode Island*, 160 F.3d 780, 786 (1st Cir. 1998) (plaintiff bears the burden of showing that a reasonable accommodation exists).

assumed that it does. *Ward v. Massachusetts Health Research Inst.*, 48 F. Supp.2d 72, 80 (D. Mass. 1999); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998); *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998). Accordingly, this Court will do the same.

To establish a hostile work environment claim, Plaintiff must demonstrate that the alleged conduct was "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.'" *Ward*, 48 F. Supp.2d at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). In determining whether the conduct alleged is "severe or pervasive" courts "'look to the gravity as well as the frequency of the offensive conduct.'" *Ward*, 48 F. Supp.2d at 80 (quoting *DeNovellis v. Shalala*, 124 F.3d 298, 311 (1st Cir. 1997)).

Here, the facts alleged are not sufficiently severe or pervasive enough to sustain a hostile work environment claim. Plaintiff points to several incidents over a 10 month period in 1996-97 to support this claim including: 1) someone writing "guess who?" on a workers' compensation poster, 2) a supervisor conducting a safety inspection of Plaintiff's shoes for only the second time in ten years, 3) employees laughing and waving goodbye to Plaintiff before a meeting that erroneously removed Plaintiff from his position and 4) Defendant's refusal to

excuse Plaintiff from work so that he could testify before workers' compensation hearings. While some of these incidents may have been unpleasant they are not sufficiently severe or pervasive. *See Ward* 48 F.Supp.2d 72, 79; *Penry v. Federal Home Loan Bank*, 155 F.3d 1257, 1261 (10th Cir. 1998) (granting summary judgment on Title VII hostile work environment claim because workplace unpleasant but not "permeated with discriminatory intimidation."); *Hartsell v. Duplex Products, Inc.*, 122 F.3d 766, 772 (4th Cir. 1997) (unpleasant and cruel comments insufficient to sustain hostile work environment claim.).

Plaintiff also complains that on several occasions Defendant removed him from the schedule thereby contributing to the hostile work environment. On the first occasion, Defendant admitted that it erroneously calculated Plaintiff's three-year clock and returned him to his position and Plaintiff lost no opportunity to perform bargaining unit work. On the second occasion, Plaintiff's department head removed him from the schedule mid-week, apparently so that Plaintiff would not work for 55 days thereby adding to his three-year clock. However, after Plaintiff complained he was allowed to finish working that week thereby working 55 days and receiving an extension on his three-year clock. Finally, Plaintiff asserts that on at least ten occasions he was erroneously scheduled and successfully filed his grievances with the Union. However, as Defendant and the

Union point out, about half of all grievances by Defendant's non-disabled employees involve scheduling.

After considering all the factual evidence submitted by Plaintiff, the Court is satisfied that the actions complained of are neither severe nor pervasive enough to sustain a hostile work environment claim.

Conclusion

For the reasons above, I recommend that Defendant's motion for summary judgment be GRANTED. Further, I recommend that third-party defendants' motion for summary judgment be GRANTED.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on: August 24, 1999